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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TOMMY LEE GALIA, Defendant and Appellant.	H033733 (Santa Clara County Super. Ct. No. CC809684)

Defendant Tommy Lee Galia appeals from a judgment entered after he pleaded no contest to driving with a blood alcohol level over .08 causing bodily injury (Veh. Code, § 23153, subd. (b)), and hit and run causing bodily injury. (Veh. Code, § 20001, subd. (a)/(b)(1.) After the trial court sentenced defendant to 16 months in prison, defendant filed a timely notice of appeal. On appeal defendant's counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Based on a statement filed by defendant and this court's review of the record on appeal, we asked counsel for defendant and respondent to submit further briefing. Finding any error by the trial court to be harmless, we will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On the morning of June 21, 2008, defendant drove his car through a red light and struck another car, causing minor injuries to its driver and passenger. Defendant immediately fled the scene. Defendant was apprehended shortly thereafter at a nearby

convenience store. At the time of his arrest, the arresting officer smelled the odor of alcohol on defendant and noted that his speech was slurred, but defendant was unable to perform the PAS test and refused to answer any questions. The blood alcohol test performed after defendant's arrest showed a blood alcohol level of 0.34.

Following waiver of preliminary hearing, an information filed by the Santa Clara County District Attorney charged appellant with driving under the influence causing bodily injury (Veh. Code, § 23153, subd. (a), count 1), driving with a blood alcohol level over .08 causing bodily injury (Veh. Code, § 23153, subd. (b), count 2), and hit and run causing bodily injury. (Veh. Code, § 20001, subd. (a)/(b)(1), count 3.) On November 12, 2008, appellant pled no contest to counts 2 and 3 after "the court . . . made an offer to sentence [him] to 16 months in state prison to resolve [his] case."

On December 11, 2008, appellant filed a motion to substitute counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). During the in camera hearing, defendant told the trial court that he had wanted a resolution of his case pursuant to "[Penal Code section] 1170.9 dealing with veterans." Defendant complained that his counsel had not pursued it, telling defendant that the judge did not have to abide by it. Defendant argued that "the language of the statute was pretty strong," and referenced two cases which held that a trial court should not frustrate the purpose of this statute. The trial court denied the *Marden* motion and moved directly to sentencing. The court sentenced defendant to 16 months in prison. The court imposed a $400 restitution fine and imposed but stayed a parole revocation fine in the same amount. The court awarded 261 days of presentence credits. This timely appeal ensued.

On appeal, defendant's counsel filed a brief pursuant to *People v. Wende, supra,* 25 Cal.3d 436, detailing the factual and procedural history of the case, but raising no arguable issues. Defendant filed an appellant's statement to supplement his counsel's brief. After considering appellant's statement and the record, this court requested further briefing on the following question: "Did the trial court err in not holding a hearing

pursuant to Penal Code Section 1170.9 prior to sentencing, after the defendant alleged that he fell under the provisions of that section?" Both parties have submitted supplemental briefs which we now consider.

DISCUSSION

Defendant contends that the trial court erred in failing to hold a hearing pursuant to the provisions of Penal Code section 1170.9 prior to sentencing him.[1] Subdivision (a) of this section provides that where a defendant "alleges" that he committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military, the court *shall*, prior to sentencing, hold a hearing to determine the applicability of the provisions of the section. (Pen. Code, § 1170.9, subd. (a), emphasis added.) Once this determination is made, subdivision (b) grants the trial court discretion to place defendant into a specialized program if defendant is elligable for probation. (Pen. Code, § 1170.9, subd. (b).)

The plain language of the statute is clear. The requirement to hold a hearing is mandatory once defendant alleges that the section may apply. Here, defendant first raised the applicability of section 1170.9 with his counsel, who screened defendant for eligibility and found him eligible for treatment services. Trial counsel then

[1] That section holds in relevant part, "(a) In the case of any person convicted of a criminal offense who would otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military, the court shall, prior to sentencing, hold a hearing to determine whether the defendant was a member of the military forces of the United States who served in combat and shall assess whether the defendant suffers from post-traumatic stress disorder, substance abuse, or psychological problems as a result of that service. [¶] (b) If the court concludes that a defendant convicted of a criminal offense is a person described in subdivision (a), and if the defendant is otherwise eligible for probation and the court places the defendant on probation, the court may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that which the defendant would have served in state prison or county jail, provided the defendant agrees to participate in the program and the court determines that an appropriate treatment program exists." (Pen. Code, § 1170.9.)

communicated defendant's elligability to the trial court during settlement discussions. Trial counsel asked the court to consider a grant of probation which would allow defendant to participate in a qualifying program. Without setting a hearing to fully assess defendant's claim that he committed the offense as a result of a condition caused by his military service, the court advised defense counsel that "it would not be interested in doing that." Although counsel's statements during settlement discussions arguably triggered the court's duty to hold a section 1170.9 hearing to assess defendant's allegations fully, that issue is outside the scope of this appeal. This is an appeal from a no contest plea and is based on issues arising out of the sentence or other matters occurring after the plea. (Cal. Rules of Court, rule 8.304(b)(4)(B).) Since the court's duty arose before the plea, it cannot be raised as an issue in this appeal.

After the defendant entered his plea, but before sentencing, defendant brought a *Marsden* motion. At the in-camera hearing, defendant raised the section 1170.9 issue again, directly with the Judge. In response to defendant's statements, trial counsel reminded the court of the earlier discussions during settlement negotiations, and reiterated that the court had not been interested in considering a sentencing option pursuant to section 1170.9. Without specifically addressing the question of whether the court would, or had considered defendant's 1170.9 claim, the court denied the *Marsden* motion and immediately proceeded to sentencing.

Although the Attorney General argues that that defendant's statements at the *Marsden* hearing were insufficient to trigger the court's obligation to hold a hearing, there is no requirement in the statute that defendant make a discreet request for a hearing. The statute requires only that defendant "allege" that the statutory scheme applies. (Pen. Code, § 1170.9 (a).) Having so alleged, the court was required to set a hearing to assess defendant's allegations. The trial court did not do this.

Failure to perform a mandatory duty may be error, but under the circumstances here any such error is harmless because defendant cannot show a reasonable probability

of a more favorable outcome on remand. (*People v. Scott* (1994) 9 Cal.4th 331, 355.) At the time defendant argued his *Marsden* motion, he had already agreed to a disposition of his case which included the dismissal of the driving under the influence causing bodily injury count (Veh. Code, § 23153, subd. (a)), and a 16 month prison sentence. This agreed upon disposition did not include probation. Penal Code section 1170.9, subdivision (b) only applies where the defendant is placed on probation. Since the parties had agreed to a disposition that did *not* include probation, the court could not, even if it found defendant's allegations supported, violate the agreement and sentence defendant to probation. The law does not require idle acts. (Civ. Code, § 3532.) A full 1170.9 hearing would have been futile, as the parties' plea agreement precluded the application of subdivision (b).

Defendant contends that the agreed upon disposition was not, in fact, a plea bargain between the parties, but instead was an indicated sentence by the court. Since an indicated sentence is not binding on the court as is a plea bargain, defendant argues the court may have changed its mind about probation after a full 1170.9 hearing. Generally, a plea bargain is a negotiated settlement between the defendant and the prosecutor, where both parties receive a reciprocal benefit, which is approved by the court. (*In re Segura* (2008) 44 Cal.4th 921, 929-930.) In *Segura*, the Supreme Court reiterated that only a prosecutor is authorized to negotiate a plea agreement, and that a trial court may not substitute itself in the place of the People in the negotiation process or agree to a disposition over the objection of the prosecutor. (*Id.* at p. 930.) An "indicated sentence," on the other hand, is where defendant admits every charge, including any special allegations, and "all that remains is the pronouncement of judgment and sentencing." (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296.) The critical elements distinguishing the two appear to be the nature of the reciprocal benefit between the parties and the nature of the court's involvement in the process.

We do not have a record of the negotiation process because it occurred in chambers. Thus, we cannot know to what extent the court led the process or whether the court merely encouraged the parties towards resolution. There, is, however, no evidence that the judge exceeded the scope of his authority to participate in the case settlement process or that he forced the prosecutor to accept the court's sentencing offer. The evidence is to the contrary. After the conference in chambers, the court told defendant that "the court has made an offer to sentence you to 16 months in state prison to resolve your case." The defendant places great weight on this first statement in arguing that the court engineered the disposition; which was, he argues, not a plea agreement negotiated by the parties, but an indicated sentence. Viewing the record in its entirety, defendant's contention is not well taken. Defendant did not plead to all of the charges as would have been the case with an indicated sentence. The first count was dismissed at sentencing. After its initial statement, the court went on to confirm with the prosecutor that, in return for the plea, she had agreed to the 16-month sentence and to dismiss count 1. Further, at sentencing, the court stated, "With regard to the remaining count, count 1, violation of Vehicle Code section 23[15]3 (a), that's dismissed pursuant to *agreement of the people* and defendant and under PC 1385." (Emphasis added.) The court's subsequent statements establish beyond doubt that the disposition in this case was negotiated between the parties with reciprocal benefits – a plea of no contest in exchange for the dismissal of one count and a 16 month prison sentence. The court's initial statement, when viewed in context with the other statements, was nothing more than an awkward expression of assent to the plea bargain.

Even if defendant's plea had not been based on a binding plea agreement, and the court could have chosen to place defendant on probation after an 1170.9 hearing, the defendant cannot show that a hearing would have led to a more favorable outcome. Obviously defendant is entitled to sentencing decisions made in the exercise of informed discretion, and a short exchange, off the record in chambers, is no substitute for a full

adversarial hearing on defendant's allegations. (*People v. Bruhn* (1989) 210 Cal.App.3d 1195, 1199-1200.) Here, however, defense counsel conceded at the *Marsden* hearing that he had already presented all of the available evidence regarding defendant's 1170.9 status to the court during settlement negotiations. At that time, despite the 1170.9 information, the court rejected a probation and/or treatment option based on defendant's very elevated blood alcohol level. Since the court refused to consider a section 1170.9 disposition based both on the evidence which would have been presented at a hearing, and on the gravity of the crime, defendant cannot show that a full hearing would have convinced the court otherwise.

Penal Code section 1170.9 was, no doubt, enacted in recognition of the fact that some of the brave men and women who serve in our nations' military may suffer grave consequences as a result of their service. The mandatory nature of Penal Code section 1170.9, subdivision (a) echoes the importance our society places on protecting these individuals who put themselves in harm's way to protect us, and, as a result, are harmed. Although the ultimate sentencing determination remains within the discretion of the trial court, a court must seriously consider a defendant's allegations that he or she may qualify for the benefits provided by this section and should make every attempt to respect the process set out therein. While, we find that defendant has not made the showing necessary for reversal, we note that the trial court disregarded its obligations under the statutory scheme on two distinct occasions during the course of the case below. Because of the importance of this statutory safeguard for our veterans, trial courts should make every reasonable effort to extend to defendants the benefits afforded.

DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.